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Supreme Court, U.S.
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No. 04-813

In The

Supreme Court of the United States

ROBERT A. JOYAL,

Petitioner,

v.

HASBRO, INC., D/B/A HASBRO GAMES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a federal court sitting in diversity may disregard decisions of the highest court of the state interpreting state law and enter a precedential decision which is in direct conflict with established state law.

PARTIES TO THE PROCEEDING

1. Petitioner Robert A. Joyal was the Plaintiff in the United States District Court for the District of Massachusetts and the Appellant in the United States Court of Appeals.

2. Respondent Hasbro, Inc. d/b/a Hasbro Games was the Defendant in the United States District Court for the District of Massachusetts and the Appellee in the United States Court of Appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *Joyal v. Hasbro, Inc.*, 380 F.3d 14 (1st Cir. 2004) (App. p.2). The opinion of the United States District Court is not reported. (App. p. 17)

BASIS FOR JURISDICTION IN THIS COURT

The United States Court of Appeals for the First Circuit entered its judgment on August 17, 2004 (App. p. 16). A timely petition for rehearing (App. p. 31) and hearing en banc (App. p. 33) was denied on September 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). (App. p. 35)

STATUTORY PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. §1652 provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules or decisions in civil actions in the courts of the United States, in cases where they apply. (App. p. 41)

STATEMENT

This case arises out of a claim of employment discrimination by petitioner Robert A. Joyal based upon age under the Massachusetts anti-discrimination statute, Mass. Gen. Laws ch. 151B. In its decision the First Circuit

refused to apply the well settled law of Massachusetts, as established by consistent decisions of the Supreme Judicial Court of Massachusetts. Since 2000, the Supreme Judicial Court has consistently held that a plaintiff in an employment discrimination case can prevail on the merits of the case by establishing a prima facie case of discrimination and introducing sufficient evidence from which a reasonable trier of fact could conclude that any one of the reasons offered by the employer for an adverse employment action is false.

The First Circuit has resolutely refused to apply well established Massachusetts law. Petitioner timely filed a petition for rehearing and hearing en banc. Both petitions were denied and the First Circuit stated that the law established by the Supreme Judicial Court made "little sense." The refusal to apply well settled Massachusetts law because it "makes little sense," (App. p. 31) results in different burdens of proof required of plaintiffs in discrimination lawsuits under the state anti-discrimination law depending exclusively and improperly on whether the cause of action was pending in federal or state court.

A. Legal Framework

The Massachusetts anti-discrimination statute makes it illegal for an employer "because of the age of an individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification." Mass. Gen. Law ch. 151B, §1B

In *Lipchitz v. Raytheon Company*, 751 N.E. 2d 360(Mass. 2001) (App. p. 44), a unanimous Supreme Judicial Court held that in cases arising under Mass. Gen. Laws ch. 151B, the establishment of a prima facie case and sufficient evidence which could support a finding that at least one of the reasons proffered by the employer for an adverse employment action was false permits a jury to infer that the adverse action was taken for a discriminatory reason. The Supreme Judicial Court reiterated that in a case of discrimination based on indirect evidence, after the establishment of a prima facie case,[1] a fact finder is permitted to infer discriminatory animus and causation from proof that the employer offered a false reason for the adverse employment decision. *See Id.*

The First Circuit acknowledged that Massachusetts law differs from federal law in this regard, referring to *Lipchitz*, 751 N.E.2d at 366, and noting that under Massachusetts law "a plaintiff may be able – automatically and regardless of circumstances – to avoid a directed verdict and reach a jury if he or she proves that at least one of the reasons given by the defendant was pretextual." *Joyal v. Hasbro, Inc.*, 380 F.3d 14, 17 (1st Cir. 2004) (App. p. 4). However, the First Circuit criticized the state's highest court's interpretation of state law, dismissing that interpretation as "an oddly mechanical rule" (App. p. 5) and one that "makes little sense." *See Id* (App. p. 31). Instead of applying state law as interpreted by the state court, the First Circuit applied its own interpretation of the plaintiff's burden of proof under state law.

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[1] The establishment of a prima facie case by the petitioner was not an issue before the First Circuit.

In doing so, the First Circuit added to a plaintiff's burden of proof under the state anti-discrimination law by requiring plaintiffs to prove that the false reason proffered by a plaintiff was a "deliberately false reason." The First Circuit stated:

> If *Lipchitz* does authorize the jury to decide for the plaintiff merely because the employer lied in one respect and regardless of circumstances, this may seem an oddly mechanical rule; one can imagine easily a case where an unimpeached and powerful nondiscriminatory reason is proved but the jury finds "pretextual" a further reason also given by the employer as a make-weight. But, like the magistrate judge, we will assume *arguendo* that under Massachusetts law any deliberately false reason would get Joyal to a jury. (App. p. 5)

Joyal, 380 F.3d at 17.

The Supreme Judicial Court expressly rejected the requirement that a plaintiff was required to prove that the actual motive to discriminate was a conscious motive. In rejecting the requirement that the plaintiff prove a conscious motive to discriminate by the employer, the Supreme Judicial Court noted that an employer who is not aware of his or her bias would still be liable under the state anti-discrimination law. In clarifying this position, the Supreme Judicial Court noted that:

> (s)tereotypical thinking, for example, involves categorizing people on the basis of broad generalizations, not necessarily accompanied by deliberate reflection or conscious thought. Employment decisions that are made because of stereotypical thinking about a protected characteristic or members of a protected class,

> whether conscious or unconscious, are actionable under G.L. ch. 151B. *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999), cert. denied, 528 U.S. 1161, 120 S.C. 1174, 145 L. Ed. 2d 1082 (2000) ("Title VII's prohibition against 'disparate treatment because of race' extends both to employer acts based on conscious racial thinking or other forms of less conscious bias"). *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) (unlawful employment practice under Federal age discrimination law to make decisions on "basis of inaccurate and stigmatizing stereotypes").

Lipchitz 751 N.E.2d at 369, n.16. (App. p. 58)

The First Circuit refused to apply this standard and placed a higher burden of proof upon the petitioner than that which would have applied in state court. The First Circuit noted that "Joyal has pointed to nothing that would entitle a jury to find that Hasbro disbelieved the reasons it gave or otherwise based its decision upon Joyal's age." *Joyal*, 380 F.3d at 18 (App. pp. 9-10). This is not the standard in Massachusetts. The Supreme Judicial Court does not require plaintiffs in state discrimination cases to prove that the employer disbelieved any reason proffered for the adverse action. Neither does the Supreme Judicial Court require plaintiffs in state discrimination cases to prove that the discriminatory motive was in any way conscious or deliberate. The requirement under state law is that a jury is *permitted* to infer discriminatory motive from sufficient evidence of a false reason, whether or not the reason is deliberately false. *See Lipchitz*, 751 N.E.2d 366 at 369 n.16. (App. p. 58)

In attempting to support its complete disregard of well established Massachusetts law, the First Circuit cites to a footnote in *Knight v. Avon Products*, 780 N.E.2d 1255, 1261 n. 4 (2003). This citation does not support the First Circuit's position but to the contrary states:

> In the first stage, the plaintiff has the burden to show, by a preponderance of evidence, a prima facie case of discrimination. The elements of the prima facie case will vary depending on, among other things, the type of discrimination alleged and the protected category at issue. In the second stage, the employer may rebut the inference of discrimination created by the prima facie case by articulating a legitimate, nondiscriminatory reason for the termination of the plaintiff's employment. This burden of production is not onerous, and once met, the proceedings have reached the third stage in the order of proof. Under the third and final prong of the analysis, the plaintiff may submit evidence that the defendant's articulated reason for the termination was not the real one, but a pretext, or cover-up, for the discriminatory motive underlying the plaintiff's termination. This allows, but does not compel, the jury to infer discriminatory animus, which remains an essential element of G.L. c. 151B that the plaintiff must prove. *See Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 116-118 (2000); *Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 440-445 (1995), While this analysis provides a useful framework for deciding motions for summary judgment and for a directed verdict, we have recommended that it is not well suited as a model for jury instructions. *See Lipchitz v. Raytheon Co.*, 434 Mass. 493, 508 (2001). Rather, '[w]e encourage trial judges to craft instructions

> that will focus the jury's attention on the ultimate issues of harm, discriminatory animus and causation. . .'

The footnote cited by the First Circuit in support of its position to ignore well established Massachusetts law in fact concerned proper jury instructions in a discrimination case. The issue before the First Circuit was the correct legal standard to be applied to determine whether petitioner has the opportunity to present his case to a jury. *See Knight*, 780 N.E.2d at 1261 n.4. In denying petitioner's petition for rehearing the First Circuit stated:

> More important, the position makes little sense: the notion that a false answer can give rise to an inference of intentional discrimination is not irrational where the answer is knowingly false (on the principle *falsus in uno, falsus in omnibus*), but an innocent mistake suggests only happenstance or carelessness rather than a guilty conscience. (App. p. 31)

By requiring evidence of a knowingly false reason, the First Circuit ignored established state law as the Supreme Judicial Court considered and specifically rejected the requirement of proof of a conscious motive by a plaintiff.

B. Proceedings Below

1. In 1969, Robert A. Joyal began his employment with Hasbro, Inc.'s predecessor, Milton Bradley. On December 28, 2000, Hasbro, Inc. terminated Mr. Joyal's employment. Hasbro, Inc. replaced Mr. Joyal, who was fifty-five years old at the time of his termination, with one of Mr. Joyal's subordinates, who was thirty-seven years old.

During his thirty-one years of service with Hasbro, Inc., Mr. Joyal maintained an unblemished personnel record. Despite Hasbro, Inc.'s practice of issuing progressive discipline when dealing with its executive employees, Mr. Joyal never received any formal or informal discipline prior to his termination.

Although Hasbro, Inc. did not give Mr. Joyal any explanation for his termination at the time of his termination, Hasbro, Inc. later stated that Mr. Joyal was terminated for the following reasons: (1) retaliation against a subordinate employee for refusing to permit Mr. Joyal to violate corporate policies; (2) misuse of corporate assets for personal use; and (3) abusive management style. There was sufficient evidence from which a reasonable juror could conclude that at least one of these reasons was untrue. For instance, Mr. Joyal's thirty-seven-year-old replacement was promoted after being accused of the very same retaliatory behavior for which Mr. Joyal was allegedly terminated.

2. Following his termination, petitioner filed a charge of discrimination with the Massachusetts Commission Against Discrimination, the administrative agency responsible for enforcing the state anti-discrimination law. Thereafter petitioner filed a cause of action in state court alleging, *inter alia*, that he was discriminated against based on his age in violation of the state anti-discrimination law.

The respondent removed the suit to the United States District Court for the District of Massachusetts on the basis of diversity. The case was originally assigned to a senior judge who passed away after hearing oral argument

on respondent's motion for summary judgment and prior to issuing a decision on the motion.

The case was reassigned to a magistrate judge and the parties assented to having the case proceed before the magistrate. The magistrate granted summary judgment in favor of the respondent on all counts of the complaint.

3. The petitioner appealed to the United States Court of Appeals for the First Circuit. The First Circuit affirmed the decision of the magistrate. Thereafter the First Circuit denied petitioner's request for rehearing, as well as rehearing en banc.

REASONS FOR GRANTING THE PETITION

This case calls for the exercise of this Court's supervisory authority over the administration of federal diversity jurisdiction. The refusal of the First Circuit to apply the law of the Commonwealth of Massachusetts violates the provisions of the Rules of Decision Act, 28 U.S.C. §1652. (App. p. 41)

If the decision of the First Circuit is not vacated or remanded with instructions to the First Circuit to properly apply state law, the burden of proof for Massachusetts plaintiffs in discrimination cases will differ depending solely on whether the case is decided in state court or federal court. Thus, a plaintiff asserting claims exclusively under the state anti-discrimination law will bear a heavier burden of proof if there exists diversity of citizenship between the parties and the action is filed in or removed to federal court than the plaintiff would bear if the matter was adjudicated in state court.

I. A FEDERAL COURT SITTING IN DIVERSITY EXCEEDS ITS ERIE AUTHORITY WHEN IT REFUSES TO APPLY STATE LAW AS ESTABLISHED BY THE HIGHEST COURT IN THE STATE.

A. The First Circuit's Refusal To Apply Massachusetts Law As Established By The State's Highest Court Is Inconsistent With The Principles Established In *Erie*.

By refusing to apply Massachusetts law as unambiguously articulated by the Massachusetts Supreme Judicial Court, the First Circuit exceeded the limits of its authority as established by *Erie v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938) for federal courts sitting in diversity. In that case this Court held that federal diversity courts must apply the law of the state whether the law of the state shall be declared by the Legislature in statute or by its highest court in a decision. *See Id.*

By refusing to apply Massachusetts law in a diversity case when that law is established, clearly articulated and reaffirmed by the highest court in Massachusetts, the First Circuit exceeded its authority and as a result of rendering and publishing this decision has increased the likelihood that the outcome of litigation for claims arising under the state anti-discrimination law will be different if those claims are tried in the state court or in the federal court based on diversity of citizenship. This result is precisely the issue that concerned this Court in *Erie* and its progeny: differing results in the outcome of litigation depending upon whether all of the parties are citizens of Massachusetts or whether there is diversity of citizenship among the parties.

> In essence, the intent of that decision [*Erie R. Co. v. Tompkins*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court.

Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 1470 (1945).

The First Circuit overruled a rule of law established by the Massachusetts Supreme Judicial Court interpreting Massachusetts law because the First Circuit found that the rule did not make sense. The danger resulting from this activism by this federal court in refusing to apply established state law is that this case can be cited in future cases involving claims under the state anti-discrimination law in federal diversity cases. District courts in Massachusetts are bound by this First Circuit decision, while state courts are required to follow the law as established by the Supreme Judicial Court. This result conflicts with the rule of law as established by *Erie* and its progeny.

> The operation of a double system of conflicting laws in the same state is plainly hostile to the reign of law. Certainly, the fortuitous circumstances of residence out of a state of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident.

Guaranty Trust Co. of New York v. York, 326 U.S. 99, 112, 65 S. Ct. 1464, 1471 (1945).

By resolutely refusing to apply Massachusetts law to Massachusetts claims, the First Circuit has established one rule of law for litigants who adjudicate a question of state law in federal courts sitting in diversity which is contrary to the rule of law for litigants of claims under the same law in state courts. This is precisely the result sought to be avoided in *Erie*. Such a conflict has historically not been tolerated by this Court. *See West v. American Telephone & Telegraph Co.* 311 U.S. 223, 236, 61 S. Ct. 179, 183 (1940) ("But the obvious purpose of §34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity citizenship."); *Wainwright v. Goode*, 446 U.S. 78, 104 S. Ct. 378 (1983) ("If the interpretation of the trial court's remarks is deemed a legal issue, it is surely an issue of state law that the Court of Appeals should have accepted, since the views of the State's highest court with respect to state law are binding on the federal courts.") (citations omitted).

This Court's review is necessary to correct the conflict between federal and state courts in Massachusetts. The conflict was created by the First Circuit and could have been avoided had the First Circuit merely followed established state law despite its apparent disagreement with such law.

II. AT MINIMUM, THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO GRANT THIS PETITION, VACATE THE JUDGMENT AND REMAND TO THE FIRST CIRCUIT TO ENTER JUDGMENT CONSISTENT WITH MASSACHUSETTS LAW.

The rejection by the First Circuit of what is required of discrimination plaintiffs under the state anti-discrimination law as determined by the Supreme Judicial Court is apparently based upon the conclusion of the First Circuit that the state rule of law is "oddly mechanical" (App. p. 5) or "makes little sense." (App. p. 31) Despite the First Circuit's apparent disagreement with the Massachusetts Supreme Judicial Court about the interpretation of a state statute, the First Circuit is obligated to apply state law as established by state courts. Failure to apply state law as articulated by the Supreme Judicial Court violates the Rules of Decision Act, 28 U.S.C. §1652 (App. p. 41) and ignores the mandate of this Court to federal courts sitting in diversity cases. Allowing federal courts sitting in diversity cases to disregard or change the rule of law established by the state's highest court would create precisely the dual systems of law prohibited by *Erie* and its progeny.

> It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship. In the absence of any contrary showing, the rule of the *Thatcher* and *Travers* cases appears to be the one which would be applied in litigation in the state court, and whether believed to be sound or

> unsound, it should have been followed by the Circuit Court of Appeals.

Fidelity Union Trust Co. v. Field, 311 U.S. 169, 180 (1940).

Compounding the refusal of the First Circuit to apply state law as determined by the Supreme Judicial Court to claims present in federal court solely on the basis of diversity is the fact that the First Circuit published the decision. Thus a decision which is contrary to state law can now be utilized as precedent in future discrimination cases in the federal district courts in Massachusetts. This is precisely the issue which has been of great concern to this Court.

Although initially articulated by the Supreme Judicial Court in 2000, the rule of law which the First Circuit refused to apply has been reaffirmed by the Supreme Judicial Court on more than one occasion. In *Knight v. Avon Products, Inc.* 780 N.E.2d 1255, 1263 (2003) (emphasis added), the Supreme Judicial Court reaffirmed that the rule of law in Massachusetts is that in cases of indirect discrimination, a jury is permitted to "infer discriminatory animus and causation from proof that an employer has advanced *a false reason* for the adverse employment decision, in the absence of direct evidence that the actual motivation was discrimination. *See Lipchitz v. Raytheon Co.*, 434 Mass. 493 (2001)". The First Circuit cited to a footnote in *Knight* in its denial of petitioner's petitions for rehearing and hearing en banc, but once again failed to follow well established state law. (App. p. 31)

Permitting the judgment of the First Circuit to stand would encourage federal courts in diversity to disregard state law when in disagreement with such rules of law. This conduct with respect to established state law would

nullify the Rules of Decisions Act and permit federal courts in diversity cases to ignore the well settled principles of law articulated in *Erie* and its progeny.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition should be granted, the judgment vacated, and the case remanded to the court of appeals for further consideration in light of established Massachusetts law.

Respectfully submitted,

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Date: December 14, 2004

United States Court of Appeals
For the First Circuit

No. 03-2495

ROBERT P. JOYAL,

Plaintiff, Appellant,

v.

HASBRO, INC., d/b/a HASBRO GAMES,

Defendant, Appellee.

ERRATA

The opinion of this Court, issued on August 17, 2004, should be amended as follows:

On page 2, line 6 of first paragraph, delete "then".

On page 3, line 1, top of page, replace "Joyal," with "Joyal." and add an extra space after the period.

On page 4, line 2 of first full paragraph, replace "more friendly" with "friendlier".

On page 15, line 7 of first full paragraph, replace "*G & W*" with "*G & M*", and on line 1 of second full paragraph, replace "*G & W*'s" with "*G & M*'s".

App. 2

United States Court of Appeals,
For the First Circuit.

No. 03-2495

ROBERT P. JOYAL,

Plaintiff, Appellant,

v.

HASBRO, INC., d/b/a Hasbro Games,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Kenneth P. Neiman, *U.S. Magistrate Judge*]

Before

Boudin, *Chief Judge,*

Lipez and Howard, *Circuit Judges.*

Tani E. Sapirstein with whom *Sapirstein & Sapirstein* was on brief for appellant.

Neil Jacobs with whom *Jessica A. Foster* and *Hale and Dorr LLP* were on brief for appellee.

August 17, 2004

BOUDIN, *Chief Judge.* Robert Joyal, the plaintiff-appellant in this age discrimination case, had worked in

Hasbro, Inc.'s games division for 31 years when he was fired on December 28, 2000. He was then 55 years old, and was replaced by a subordinate who was 37 years old. After exhausting administrative remedies, Joyal then brought suit in state court against Hasbro, which removed the matter to federal court on diversity grounds.

Joyal's complaint charged that Hasbro had illegally discriminated against Joyal by firing him on the basis of age, in violation of Mass. Gen. Laws ch. 151B, § 4 (1B) (2002). In two further counts, Joyal claimed that Hasbro had breached its employment contract with him by failing to use progressive discipline and had improperly deprived him of an end-of-year bonus to which he was entitled under the company's management incentive plan.

Following discovery, Hasbro moved for summary judgment on all three of Joyal's claims. The magistrate judge, acting on the matter with the consent of the parties, 28 U.S.C. § 636(c) (2000); Fed. R. Civ. P. 73, granted summary judgment to Hasbro on all counts on October 27, 2003. Joyal now appeals. We consider *de novo* whether the district court properly granted summary judgment, *see Landrau-Romero* v. *Banco Popular De Puerto Rico,* 212 F.3d 607, 611 (1st Cir. 2000), and draw all reasonable inferences in favor of Joyal. *Sparks* v. *Fidelity Nat'l Title Ins. Co.,* 294 F.3d 259, 265 (1st Cir. 2002).

The main subject of Joyal's appeal is his statutory age discrimination claim. The Massachusetts statute, like the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000), generally prevents employment action taken against older employees because of their age. Massachusetts case law uses a burden-shifting device akin to federal law to force the employer to supply reasons for

his action once an easily made *prima facie* case is established. *Compare Abramian* v. *President & Fellows of Harvard Coll.*, 731 N.E.2d 1075, 1084-86 (Mass. 2000), *with McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802-05 (1973).

Here, Joyal provided the *prima facie* case, primarily by showing that he was in the age-protected group and was replaced by a substantially younger man. *See Blare* v. *Husky Injection Molding Sys. Boston, Inc.*, 646 N.E.2d 111, 115 (Mass. 1995). Hasbro in turn provided three specific reasons for the firing, coupled with facts colorably supporting the reasons: Joyal's misuse or attempted misuse of company property for personal benefit; retaliation against an employee who had refused to cooperate with that misuse; and an abusive management style.

Under Massachusetts law, as under federal law, the employer's provision of a non-discriminatory reason or reasons rebuts the presumption of discrimination created by the prima facie case, and the issue of discriminatory intent then turns upon the evidence. *Abramian,* 731 N.E.2d at 1084-86. Under federal law, that evidence may include inferences drawn against the employer if his alleged reason or reasons for the adverse action are shown to be "pretextual." *Udo* v. *Tomes,* 54 F.3d 9, 12-13 (1st Cir. 1995).

Massachusetts law is similar, but in one relevant respect perhaps even more friendly to plaintiffs. Under *Lipchitz* v. *Raytheon Co.*, 751 N.E.2d 360, 366 (Mass. 2001), a plaintiff *may* be able – automatically and regardless of circumstances – to avoid a directed verdict and reach a jury if he or she proves that at least one of the reasons given by the defendant was pretextual. This

subtlety was not at issue in *Fite* v. *Digital Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000), where we said that federal and Massachusetts law were aligned, but were dealing mainly with jury instructions and not a directed verdict.

If *Lipchitz* does authorize the jury to decide for the plaintiff merely because the employer lied in one respect and regardless of circumstances, this may seem an oddly mechanical rule; one can imagine easily a case where an unimpeached and powerful nondiscriminatory reason is proved but the jury finds "pretextual" a further reason also given by the employer as a make-weight. But, like the magistrate judge, we will assume *arguendo* that under Massachusetts law any deliberately false reason would get Joyal to a jury.

In this case, there is no direct evidence, such as slighting remarks or express admissions, *see, e.g., Blare*, 646 N.E.2d at 113-14, 118; *Fontaine* v. *Ebtec Corp.*, 613 N.E.2d 881, 885-86 (Mass. 1993), that Hasbro was hostile to older workers or that Joyal's dismissal was motivated by age. However, Joyal argues that the circumstances of the dismissal – above all, the alleged falsity of one or more of the reasons given – would permit a reasonable jury to infer that one or more of the reasons was pretext and therefore, under *Lipchitz*, that age discrimination was an actual motive for Joyal's dismissal.

This is the most familiar of issues on summary judgment: whether, resolving reasonable doubts in his favor, the evidence so far could rationally support a jury verdict for the plaintiff. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Contrary to Joyal's intimation on appeal, there is no indication that the magistrate judge misunderstood the legal framework adversely to Joyal.

But, by the same token, our obligation is independently to assess the evidence and reach our own conclusion.

The basis offered for Hasbro's actions is easily summarized based on the summary judgment record. Hasbro is a major toymaker headquartered in Rhode Island with operations in various other locations. Over a 31-year period, Joyal worked his way up to a senior vice president position at the company's plant in East Longmeadow, Massachusetts. David Wilson was the division president based at the facility and, at the time of the firing, Joyal reported to Wilson – who in turn reported to Alfred Verrecchia, Hasbro's president and chief executive officer in Pawtucket, Rhode Island.

In August 1999, Joyal through another employee asked a subordinate, Scott Aye, for the keys to a Hasbro truck so that Joyal could transport personal materials to his home. This might appear to be a trivial matter, but Hasbro had a history of criminal and civil litigation in the 1990s involving corruption and misuse of company assets. *See generally United States* v. *Serafino,* 281 F.3d 327 (1st Cir. 2002). Its company handbook prohibited such misuse, and an explicit policy statement specifically regarding the use of company vehicles for private purposes had been circulated to Joyal's division in March 1999.

Aye refused to give Joyal the truck keys, noting that to do so would be a violation of company policy. Joyal became angry and expressed his anger to Aye's immediate supervisor, who gained the impression that Joyal was planning to retaliate. In September 1999, Joyal demoted Aye to a lower management position and withdrew certain job responsibilities from him, and during the following year Aye received a below-average bonus and

wage increase. Joyal then proposed that Aye be supervised by another employee (David Dunican), whom Aye particularly disliked, even though Aye had previously been assured by the company that he would not be thus assigned.

In the summer of 2000, Aye told the division's director of human resources that he was seeking legal advice and complained to Wilson of the apparent retaliation. In August, Wilson met with Joyal and Aye; Wilson promised Aye that he would not have to report to Dunican and Aye withdrew a proposed letter of complaint to corporate headquarters. Wilson also spoke privately to Joyal and told him to fix his relationship with Aye. Additionally, Wilson told Joyal to stop his practice of bringing trash from home to the plant to be disposed of by Hasbro employees.

In this period and in the fall, Wilson also became concerned about Joyal's management style in dealing with other subordinates, particularly allegations of harsh language and abuse. An employee opinion survey around this time showed that Joyal's department ranked significantly lower than others in categories such as leadership, teamwork, and fairness of employee treatment; Wilson's follow-up conversations with Aye and another employee previously under Joyal's supervision reinforced these concerns.[1]

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[1] In preparation for litigation, other previous subordinates of Joyal confirmed his abusive management style; two of them issued affidavits stating that his behavior had been a contributing cause to their resignations from Hasbro.

In the late fall, Aye was informed by his supervisor that Joyal was still considering making him report to Dunican. Aye complained to Wilson, who then contacted the Rhode Island headquarters. After discussions with other executives and an investigation by a company lawyer, Verrecchia accepted Wilson's recommendation that Joyal be terminated, and the termination occurred on December 28, 2000.

On this appeal, Joyal picks at details, but the evidence for this history is solid. Joyal says, for example, that he asked to use the truck but did not succeed, as if this matters. He says that he "promoted" Aye, but this is a no more than an unpersuasive gloss on Joyal's acknowledged change of Aye's employment responsibilities. Joyal claims that the subordinate who replaced him denied mistreatment at his hands, which is true, but the subordinate confirmed that other employees had complained to him of mistreatment by Joyal.

This is a sample, but the other objections are mostly of the same order. Such minor quibbles are insufficient to create "genuine issues of material fact" precluding summary judgment. *Mack* v. *Great Atl. & Pac. Tea Co., Inc.*, 871 F.2d 179, 181-82 (1st Cir. 1989). Without discussing each contention in detail, it is enough to say that Joyal's disagreements do not cast serious doubt on Hasbro's evidence as to what happened.

Joyal also suggests that a jury might think it implausible that a senior manager would be fired after over 30 years of employment without further discussion and an opportunity to mend his ways. But two of the charges against Joyal were fairly serious – systematic harshness toward subordinates and retaliation against an employee

who sought to frustrate Joyal's violation of company policy. And Joyal's conduct was not a single incident, but a set of arguably related deficiencies occurring over a period of time.

In some measure Joyal was offered an opportunity to square himself in the initial meeting with Wilson and Aye. Seemingly, it was the last straw when Wilson learned of the survey and of Aye's renewed complaint that the Dunican assignment was still under consideration. Wilson had promised Aye that the Dunican matter had been dropped and did not want the original retaliation charge widely aired; and the survey suggested that the anecdotal reports as to Joyal's management style were well founded.

Against this background, the addition of the truck keys charge to the list does not rationally suggest that it was pretextual. Arguably, given the 1990s background this was a more serious matter than it might have been in other companies – but the real point is that this delinquency did not stand alone. It was one of a group of reasons listed for the discharge. The fact that it was perhaps less serious than the others, and might not have sufficed standing alone, does not suggest that it was false or pretext.

Whether Hasbro was fair or wise does not matter to this claim, nor does it matter whether Wilson was right in perceiving Joyal as a harsh manager and one who could not give up a grudge; it is enough that Wilson so believed. "[I]f the reason given by the employer is the real reason for its action," it does not matter if "the employer's action was arbitrary or unwise." *Wheelock Coll.* 355 N.E.2d at 315. Joyal has pointed to nothing that would entitle a jury to

find that Hasbro disbelieved the reasons it gave or otherwise based its decision upon Joyal's age.

Joyal also appeals the two contract or contract-related claims stated in his complaint. One is easily addressed. Joyal was a senior manager holding his office at will. Nevertheless, he asserts that two documents issued by the company constituted a contract between him and the company, binding the latter to provide "progressive discipline" for misconduct rather than discharge. The two documents are the company's "Employee Handbook" and its "Guide to Corporate Conduct."

Massachusetts law does in some circumstances allow an employee to premise a contract claim on published company procedures. *See O'Brien* v. *New England Tel. & Tel. Co.*, 664 N.E.2d 843, 846-50 (Mass. 1996); *Jackson* v. *Action for Boston Comm. Dev., Inc.*, 525 N.E.2d 411, 414-16 (Mass. 1988). Although "[t]here is no explicit test or 'rigid list of prerequisites' to aid in ascertaining if a personnel manual comprises a binding contract under Massachusetts law," *Hinchey* v. *NYNEX Corp.*, 144 F.3d 134, 141 (1st Cir. 1998) (quoting *O'Brien*, 664 N.E.2d at 847), both documents here contain explicit disclaimers stating that they are no more than guidelines subject to change at will.

Even if they were arguably contracts, it would not affect the outcome. Joyal points to nothing in them that promises progressive discipline for employees; the portions of the handbook provided to the court contain no such language at all, and the guide simply lists different possible disciplinary actions. As to Joyal's claim that in practice the company applied progressive discipline, the company witness relied upon for this view made clear that there was certainly no such policy for management employees.

This brings us to Joyal's third and final claim, which is not for reinstatement but for payment of a bonus (of unspecified amount). Averring that his department met its financial goals for 2000, Joyal says that under the company's management incentive plan he would have been entitled to a year-end bonus for 2000 if he had remained employed into 2001. Under the terms of the plan, he was ineligible for the bonus because he was let go before the end of 2000.

Under Massachusetts law, an employee who would be entitled to a bonus or commission based on his past performance and who is deprived of it by a discharge without "good cause" may recover the sum already "earned" even though contingent on a condition not fulfilled.[2] The theory is that even in a contract for employment at will, there is an implied obligation of good faith and fair dealing. Recovery is only for this already accrued, albeit contingent compensation; the implied obligation does not otherwise give the employee protection against discharge without cause. *Cort,* 431 N.E.2d at 911.

One might think from its origin and some of the case law language that liability under this line of cases would arise only for "bad faith" discharges, such as a deliberate attempt to deprive the employee of his bonus or compensation. But Massachusetts decisions hold that even without a malign motive, a discharge without "good cause" is enough to make the defendant liable for contingently due

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[2] *See Cort* v. *Bristol-Myers Co.*, 431 N.E.2d 908, 910-11 (Mass. 1982); *Gram* v. *Liberty Mut. Ins. Co.*, 429 N.E.2d 21, 29 (Mass. 1981); *Fortune* v. *Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1255-59 (Mass. 1977).

bonuses. Thus in *Gram,* the Supreme Judicial Court stated:

> [T]he obligation of good faith and fair dealing . . . requires that the employer be liable for the loss of compensation that is so clearly related to an employee's past service, when the employee is discharged without good cause. . . . [A]bsence of good faith need not be proved to the extent that there must be a showing of an improper motive for the discharge.

429 N.E.2d at 29.

The incentive plan in this case did not give Joyal an unqualified right to the bonus if he remained employed into 2001; all bonuses under the plan were also expressly contingent upon the approval of Hasbro's CEO. Possibly this would make a difference to Massachusetts courts, *cf. Harrison* v. *NetCentric Corp.*, 744 N.E.2d 622, 629-31 (Mass. 2001); *Cheney* v. *Automatic Sprinkler Corp. of Am.*, 385 N.E.2d 961, 963-64 (Mass. 1979), especially if the CEO ordinarily exercised discretion; but we will assume *arguendo* that under *Cort* the CEO's veto would also require good cause.

This poses squarely the question, little discussed in the Massachusetts cases, of what exactly constitutes "good cause." One possibility is that someone, conceivably the jury, is left to weigh the equities and assess whether the particular default merits the particular penalty (here, the amount of the bonus). Labor arbitrators sometimes assume such powers under collective bargaining agreements where discharge or other penalties are at stake. *See Poland Spring Corp.* v. *United Food & Commercial Workers Int'l Union, Local 1445*, 314 F.3d 29, 33-36 (1st Cir.

2002), *cert. denied*, 124 S. Ct. 177, (2003); *Keebler Co.* v. *Truck Drivers, Local 170*, 247 F.3d 8, 12-14 (1st Cir. 2001).

The other alternative, which we think better founded in Massachusetts case law, is to posit an objective standard and to ask whether the asserted "cause" for discharge is a legitimate one as opposed to one that is dishonest, arbitrary or trivial. If the cause turned on material disputed facts, then a jury would resolve them and apply the standard; on undisputed facts, who would decide is less clear, although this is a different issue.[3]

While the phrase "good cause" in the *Cort* context has not been well construed, the concept of "just cause" for discharge has been glossed several times by Massachusetts courts, *see, e.g., G & M Employment Serv., Inc.* v. *Commonwealth*, 265 N.E.2d 476 (Mass. 1970); *Goldhor* v. *Hampshire Coll.*, 521 N.E.2d 1381, 1385 (Mass. App. Ct. 1988), which have also equated the two phrases.[4] *G & M* involved a statute requiring refunds by employment agencies to employees discharged early on without just cause. Justice Cutter stated:

> The standard of 'just cause' . . . in the context of a statute regulating employment agencies, would require determination (among other matters)

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[3] On some issues – such as contract interpretation – the judge decides. On others (negligence is the prime example) the jury gets to apply the standard even on undisputed facts if the case could reasonably be decided either way. *See United States* v. *Rule Indus., Inc.*, 878 F.2d 535, 541-42 (1st Cir. 1989). The choice is partly one of policy, but is also a product of history. *See, e.g., Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370 (1996).

[4] *See Gram*, 429 N.E.2d at 28 & n. 8; *cf. Amoco Oil Co.* v. *Dickson*, 389 N.E.2d 406, 408-10 (Mass. 1979) (defining "due cause" by reference to definitions of "good cause" and "just cause").

> whether there existed (1) a reasonable basis for employer dissatisfaction with a new employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct, or other culpable or inappropriate behavior, or (2) grounds for discharge reasonably related, in the employer's honest judgment, to the needs of his business. Discharge for a 'just cause' is to be contrasted with discharge on unreasonable grounds or arbitrarily, capriciously, or in bad faith.

G & M Employment Serv., Inc., 265 N.E.2d at 480.

A less elaborate but similar definition was given for good cause in a much earlier case, *Rinaldo* v. *Dreyer*, 1 N.E.2d 37, 38 (Mass. 1936), which offered perhaps even greater latitude to the employer: "If the cause assigned is at least fairly debatable and is asserted honestly, and not as a subterfuge, that is enough." Whether or not the Supreme Judicial Court today would go quite so far might be debated, but *G & W* has not been disapproved and has been treated as a governing precedent. *See* Moriearty et al., 45 *Massachusetts Practice: Employment Law* § 2.4 (2003).

Measured by *G & W*'s language, there can be no doubt that good or just cause existed for Joyal's discharge. Even if the issue were for the jury in a close case, no rational jury could fail here to find "a reasonable basis for employer dissatisfaction" based upon "culpable or inappropriate behavior." At the very least, facts not fairly disputed put Joyal's conduct in the latter category, permitting under *Cort* the forfeiture of the contingently accrued bonus.

Cort by its own terms is designed to prevent the loss of such contingent payments based upon dishonest or

arbitrary action by the employer. Here, there is no basis for imputing dishonesty to Hasbro, and no jury could reasonably describe as "arbitrary" the discharge of a senior manager who sought to violate clear company policy, who retaliated against one who complained and who maintained a poor relationship with other employees under his authority.

Affirmed.

United States Court of Appeals
For the First Circuit

No. 03-2495

ROBERT P. JOYAL,

Plaintiff, Appellant,

v.

HASBRO, INC., d/b/a HASBRO GAMES,

Defendant, Appellee.

JUDGMENT

Entered: August 17, 2004

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
Richard Cushing Donovan, Clerk

By: MARK R. SYSKA
Chief Deputy Clerk

[cc: Jessica A. Foster, Esq., Karen E. Schneck, Esq., Michael A. Haberman, Esq., Neil Jacobs, Esq., Tani E. Sapirstein, Esq.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT P. JOYAL, Plaintiff	)	
v.	)	Civil Action No. 01-30130-KPN
HASBRO, Inc. d/b/a HASBRO GAMES, Defendant	)	

MEMORANDUM AND ORDER WITH REGARD TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Document No. 34)
October 27, 2003

NEIMAN, U.S.M.J.

Robert P. Joyal ("Plaintiff") brings this action against his employer, Hasbro, Inc. d/b/a Hasbro Games ("Hasbro"). Hasbro has corporate offices in Pawtucket, Rhode Island, and in East Longmeadow, Massachusetts. Plaintiff's complaint alleges three causes of action: (1) Hasbro terminated him because of his age in violation of Massachusetts General Law Chapter 151B ("Mass. Gen. Laws ch. 151 B"), (2) Hasbro breached a contract when it failed to pay Plaintiff an annual bonus, pursuant to Hasbro's Management Incentive Plan ("MIP"), and (3) Hasbro breached an employment contract when it terminated him and failed to apply progressive discipline.

The parties come to this court by way of diversity jurisdiction. The case was originally before Senior District Judge Frank H. Freedman, who sadly passed away on August 21, 2003. The parties have since consented to this

court's jurisdiction pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73(b).

Presently before the court is Hasbro's motion for summary judgment. In addressing the motion, the court has not only the benefit of the parties' briefs but a transcript of the oral argument before Judge Freedman as well. For the reasons set forth below, the court will grant Hasbro's motion for summary judgment on all three counts.

I. STANDARD OF REVIEW

Summary judgment is appropriate where the record reveals no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In opposing a motion for summary judgment, the burden is on the non-moving party to point to specific facts that would enable a reasonable juror to find in its favor. *See Nat'l Amusement, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995). Even in employment discrimination cases, "where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

Determining whether a contract is ambiguous is a question of law for a judge to decide. *See Lohnes v. Level 3 Communications, Inc.*, 272 F.3d 49, 53 (1st Cir. 2001). If the court determines the contract language is unambiguous, it will construe the document based on the plain meaning of the language. *See id.* If an ambiguity looms, then interpretation is a matter of fact. *See id.* at 54.

Summary judgment may still lie, however, if a party fails to support its interpretation of a purportedly ambiguous term. *See id.* at 53.

II. BACKGROUND

The facts in a light most favorable to Plaintiff are as follows. Plaintiff was born on June 8, 1945, and began working for Hasbro at the East Longmeadow office in 1969. (Document No. 1 ("Complaint") ¶¶ 4, 5.) Plaintiff was fifty-five years old when Hasbro terminated him in December of 2000. (*Id.* ¶ 11.) Plaintiff did not receive progressive discipline before being terminated, and was replaced by a thirty-seven year old individual who had previously reported to him. (*Id.* ¶¶ 8, 12.)

During the 1990s, several of Hasbro's executives were criminally and civilly investigated, indicted and convicted for money laundering, mail fraud and kickbacks. (Document No. 48. Corrected Statement of Undisputed Material Facts in Support of Hasbro, Inc.'s Motion for Summary Judgment ("Hasbro's Statement"),[1] ¶ 6.) Soon thereafter, Hasbro adopted a Guide to Corporate Conduct ("Guide"), which prohibited unauthorized personal use of corporate assets by its executives. (Document No. 40, Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Opposition"), at 14.) Hasbro also adopted written prohibitions forbidding the use of company-owned

[1] Citations herein to Hasbro's Statement are either supported or uncontroverted by Plaintiffs' Statement of Disputed Material Facts ("Plaintiffs Statement"), which follows Hasbro's Statement paragraph for paragraph.

vehicles for personal use, as well as an Employee Handbook ("Handbook"), (Complaint ¶ 21.)

In August 1999, in front of other employees including Vice-President of Manufacturing, Gary Brennan ("Brennan"), Plaintiff asked Scott Aye ("Aye") for the keys to a Hasbro truck for Plaintiff's personal use. (Opposition at 3.) Aye refused. (*Id.*) Plaintiff was upset about the manner in which Aye responded to the request. (*Id.*) Aye complained of the incident, and of Plaintiff's reaction, to his supervisor, Brennan, and to Plaintiff's direct superior, E. David Wilson ("Wilson"), President of Hasbro Games. (Hasbro's Statement ¶ 15.) Brennan, who was a witness to the incident, reported to Aye that Plaintiff was, in fact, upset with Aye's response to his request and was "out to get" Aye. (*Id.* ¶ 12.)

In September of 1999, Plaintiff changed Aye's responsibilities, although he denies demoting Aye or having any animosity toward him. (Opposition at 3.) However, Plaintiff admits to taking a number of actions to change Aye's employment status, at one time suggesting that Aye report to Dave Dunican ("Dunican"), Vice President of Engineering, for whom Aye had a strong dislike. (*Id.*) Ultimately, Plaintiff did not make the change that would have Aye report to Dunican. (*Id.*)

Plaintiff had been depositing his household trash on Hasbro Games's property on a weekly basis from 1976 through August 10, 2000. (*Id.*) In so doing, Plaintiff did not believe that he was violating Hasbro's Code of Conduct. (Hasbro's Statement ¶ 17.) However, he admitted in his deposition that he was aware his actions could reasonably create the appearance that he was taking advantage of his position. (Joyal Deposition, Exhibit 4 to Document No. 37,

at 183.) Plaintiff ceased bringing his garbage to Hasbro Games once Wilson forbade him to do so. (Opposition at 3.)

Plaintiff used Hasbro vehicles for personal use without authorization as late as mid-1999. (Statement ¶ 18.) Plaintiff also directed Hasbro employees to use a Hasbro vehicle in order to pick up and deliver Hasbro-owned furniture to his home during working hours. (*Id.* ¶¶ 19-20.) Plaintiff claims, however, that all this occurred before he received any rules forbidding such actions. (*Id.*)

In August of 2000, Wilson began looking into Plaintiff's management style following an employee survey ranking Plaintiff's department significantly below all other departments at Hasbro. (*Id.* ¶ 21.) Plaintiff's direct subordinates reported to Wilson that Plaintiff was abusive. (*Id.* ¶¶ 22, 24, 25.) Wilson learned, for example, that Plaintiff would hold mandatory daily morning meetings where he would lose his temper, yell at subordinates and use profanity. (*Id.*) Plaintiff admits that Wilson believed that Plaintiff was abusive and yelled at his employees. (*Id.* ¶ 23.) Plaintiff also admits swearing in front of these employees, but he denies swearing at his subordinates – in the sense of calling them names – or treating them disrespectfully. (*Id.*)

Wilson did not immediately mention any complaints about Plaintiff to Hasbro's corporate officers in Rhode Island. (*Id.* ¶¶ 16, 28.) Instead, in August of 2000, he gave Plaintiff a warning about the garbage and told him that some employees thought his management style was harsh. (*Id.* ¶ 28.)

In or around November of 2000, Aye informed Wilson that Plaintiff was still changing Aye's employment duties.

(*Id.* ¶ 31.) Wilson became concerned that Plaintiff's behavior suggested that he was retaliating against Aye. (*Id.*)

Believing that Plaintiff's actions were in violation of Hasbro's policies, Wilson finally informed Hasbro's human resources department, and others in corporate positions, of the perceived problems with Plaintiff. (*Id.*) Quickly and ultimately, the investigation (which did not include direct questioning of Plaintiff) led to Plaintiff's termination in December of 2000. (Complaint ¶ 11.)

Hasbro's MIP, in effect since August of 1996, provided incentive bonus compensation to those officers, managers and key employees who contributed significantly to the company. (Hasbro's Statement ¶ 51.) The MIP also set forth eligibility requirements and other conditions governing the payment of such bonuses. (Opposition at 13.) The MIP mandated that bonuses be paid as near as possible to the close of Hasbro's fiscal year. (Hasbro's Statement ¶ 52.) The bonuses were generally paid in March of the following year. (*Id.* ¶ 54.) The MIP also mandated that an individual be employed at the time of the payment in order to receive the bonus. (*Id.* ¶ 52.)

In December of 2000, when he was dismissed, Plaintiff had met his target financial goals for that fiscal year, but he was not working the following March when the bonuses were actually distributed. (Complaint ¶¶ 9, 11.) Accordingly, Plaintiff did not receive a bonus for fiscal year 2000.

III. DISCUSSION

The court will address Hasbro's motion for summary judgment with regard to each of the three counts in Plaintiff's complaint. For the reasons set forth below, the

court will grant summary judgment in Hasbro's favor *in toto*.

A. COUNT I – AGE DISCRIMINATION (Mass. Gen. Laws ch. 151B)

With respect to the first step of the three part analysis to be undertaken by the court, Plaintiff makes a prima facie case of age discrimination under Mass. Gen. Laws ch. 151B as alleged in Count I. He has shown that he was (1) a member of a protected class, (2) qualified for the position, (3) terminated, and (4) replaced by someone with similar qualifications. *See Bloomfield v. Bernardi Automall Trust,* 170 F. Supp 2d 36, 40 (D. Mass. 2001).

Hasbro, however, at step two of the analysis, has offered nondiscriminatory reasons for Plaintiff's termination, thereby rebutting any presumption of discrimination. *See Bloomfield,* 170 F. Supp 2d at 40-41. Hasbro states that it fired Plaintiff for three reasons: (1) his retaliation against Aye for refusing to permit him to violate corporate policies; (2) his misuse of corporate assets for personal use; and (3) his abusive management style.

As Plaintiff is well aware, these legitimate nondiscriminatory reasons destroy the presumption of discrimination and advance the proceedings to the third analytical step where Plaintiff must show that Hasbro's proffered reasons for his termination were a pretext for unlawful discrimination. *See Abramian v. President & Fellows of Harvard College*, 731 N.E.2d 1075, 1084-85 (Mass. 2000). To accomplish this task, Plaintiff, in order to avoid summary judgment, must produce enough evidence for a reasonable fact finder to decide that Hasbro terminated him because of his age, not the reasons proffered.

See Bloomfield, 170 F. Supp 2d at 41. To be sure, Plaintiff has to show that only one of the proffered reasons was a pretext. *See Bloomfield*, 170 F. Supp 2d at 41 (citing *Lipchitz v. Raytheon Co.*, 751 N.E.2d 360 (Mass. 2001)). Unfortunately for his cause, however, Plaintiff has not met this burden.

1. Retaliation

By his own admission, Plaintiff began making changes to Aye's employment status only one month after Aye denied Plaintiff's request to use a Hasbro truck for personal reasons. In particular, Plaintiff suggested making Aye report to Dunican, whom Aye disliked. Other than simply denying retaliation, Plaintiff offers nothing to shed much doubt on Hasbro's opinion, in deciding to terminate him, that he was retaliating against Aye. Plaintiff cannot simply claim that his termination was somehow unfair; he must at least address how Hasbro was not in fact motivated by its perception of events when terminating him. *See Bloomfield*, 170 F. Supp 2d at 44. Simply put, Plaintiff has not done so.

2. Misuse of corporate assets

Plaintiff claims not to have known that bringing his garbage to work was violative of Hasbro policy. He asserts further that he ceased doing so as soon as Wilson told him to stop. And although Plaintiff admits asking Aye for the keys to a company-owned vehicle, he "vigorously disputes that he engaged in conduct that violated company policy." (Opposition at 7.)

Plaintiff, however, offers little support for his position. He simply speculates that "[i]t is unlikely that the employment of a thirty-one year employee would be terminated,

without warning, because he brought his household garbage to work for disposal . . . [and for] requesting the keys to a company truck on one occasion." To be sure, Plaintiff is entitled to speculate, but such unsupported speculation does not help him in the context of Hasbro's motion for summary judgment. *See Medina-Munoz,* 896 F.2d at 8. Moreover, Hasbro is not required to have a good reason to fire him, just a nondiscriminatory one. *See Bloomfield,* 170 F. Supp 2d at 44. Here, in light of Hasbro's experience with officers misusing corporate assets, and without more of a showing from Plaintiff, a reasonable fact finder could not say that the misuse of corporate assets was a pretext for age discrimination. The evidence before the court shows only that, as soon as managers discovered that Plaintiff continued to take advantage of his corporate power for personal gain, Hasbro dismissed him.

3. Abusive management style

To rebut Hasbro's evidence regarding Plaintiff's management style – employee statements saying as much and the employee opinion survey results that ranked his team lowest – Plaintiff must show Hasbro was lying when it terminated him, not that it was unfair. *See Bloomfield,* 170 F. Supp 2d at 44. Plaintiff simply asserts, however, that there is no basis for Hasbro to have believed that anyone could have problems with his management style. For example, he claims the following: that there is no basis for Wilson's belief that his management style was inappropriate; that he was never disciplined for his management style; and that there was nothing in his personnel file which indicated his management style was a problem for anyone. Moreover, Plaintiff suggests as grounds for pretext that others at Hasbro used the same management

style as he. At most, Plaintiff admits to using "ballpark language" in his morning meetings.

Plaintiff, however, offers no proof, just conclusory allegations. More importantly for purposes here, Plaintiff does not provide sufficient evidence to convince a reasonable fact finder that Hasbro did not believe Plaintiff had an abusive style or should be fired for this reason. In the end, Plaintiff provides insufficient evidence, even for summary judgment purposes, that Hasbro singled him out for dismissal – as he now claims – or that Hasbro's justifications for his termination are pretexts for discrimination. *See Bloomfield*, 170 F. Supp 2d at 41. Nothing in Plaintiff's proffer points to age discrimination.

B. COUNT II - BREACH OF CONTRACT (Bonus Issue)

In Count II, Plaintiff claims that Hasbro failed to pay him a bonus for fiscal year 2000 in violation of its bonus plan. In particular, Plaintiff claims that Hasbro breached an implied covenant within the MIP to act in good faith and deal fairly with him. *See Fortune v. Nat'l Cash Register*, 364 N.E.2d 1251, 1256 (Mass. 1977).

As an initial matter, there is some question as to whether the MIP (offered into the record by Hasbro, not Plaintiff) can be deemed a contract. Of course, a court, depending on the circumstances, can sometimes infer a contract from a document like Hasbro's MIP. *See Jackson v. Action for Boston Cmty. Dev., Inc.*, 525 N.E.2d 411, 415 (Mass. 1988). Such an implied contract would have to include as one of its terms the underlying basis for the employee's claim. Moreover, the employee would have to show that he or she met the condition precedent. *See id.* at

416. Only then could the employee make out a case for breach of contract. *See id.*

Even were the court to assume here that Hasbro's MIP amounted to an implied contract, Plaintiff's claim fails. The critical term of the MIP is that "[p]articipants in the plan must be employed at the time of award distribution in order to receive bonus payments," (Section 6.2 of the MIP, Exhibit 37 to Document No. 38.) Plaintiff, therefore, must have been working for Hasbro when bonuses were distributed in March of 2001. He was not. "Plain words are to be given their plain meaning," *Forte v. Caruso,* 146 N.E.2d 501, 504 (Mass. 1957), and here, the plain language of the MIP makes clear that Plaintiff was not entitled to a bonus in March of 2001. *See Filiatrault v. Comverse Tech., Inc.,* 275 F.3d 131, 138 (1st Cir. 2001) ("When the words of a . . . pay plan are plain, [the court should] refrain from attempting to tease out of the text far-fetched nuances or meaning.").

Nevertheless, Plaintiff argues that he "earned" the bonus and that his termination in December 2000 looks suspiciously like a purposeful attempt on Hasbro's part to avoid payment. Again, however, Plaintiff only offers speculation, not proof. Moreover, the overall tenor of the MIP makes clear that bonuses were not actually "earned" but were granted at the discretion of Hasbro's Chief Executive Officer. (See Document No. 38, Exhibit 32.) The cases Plaintiff offers as support of his argument, therefore, miss the point. *See Fortune,* 364 N.E.2d at 1253 (employee salesman had a written contract specifying that he would receive a weekly salary for a fixed amount plus a bonus for sales made within his territory); *Gram v. Liberty Mut. Ins. Co.,* 429 N.E.2d 21 (Mass. 1981) (employee salesman's

compensation was determined by a percentage commission on his sales and there was no bonus issue at all).

The fact remains that Plaintiff was not working on the day bonuses were distributed and it is of no moment that he felt his bonus was earned. This may seem like a bad deal for Plaintiff, but if a contract existed at all, then these were the terms that governed.

C. COUNT III – BREACH OF CONTRACT (Employee Handbook and/or Personnel Policies)

Finally, Hasbro asks the court to grant summary judgment on Count III, Plaintiff's claim for breach of contract alleging a failure on Hasbro's part to follow a policy of progressive discipline. Again, the court finds that Plaintiff's argument falls short.

Generally, where an employment contract contains no fixed period of employment, the courts will consider it at-will employment. *See Jackson*, 525 N.E.2d at 414. However, as indicated, a court can imply a contract of employment from an employee manual depending on the circumstances of the case. *See id.*

Here, Plaintiff offers both the Handbook and the Guide as evidence of a progressive discipline policy binding on Hasbro. Yet, even if the Handbook and Guide can be read together as an implied contract, Plaintiff points to no language in either document that can be construed as mandating progressive discipline.[2]

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[2] Interestingly enough, Plaintiff did not provide the court with either document. Hasbro, however, provided a copy of the Guide and three pages of the Handbook.

At best, Plaintiff quotes the following language from the Guide:

> Any infraction of applicable laws or of prevailing business ethics or of the requirements of this Guide can have severe consequences for both Hasbro and its employees and will subject the offending employee to disciplinary action.
>
> Disciplinary measures will apply to any supervisor who directs or approves of such actions, or has knowledge of them and does not promptly correct them.
>
> Violations of this Guide by any employee may result in one or more of the following, as appropriate: a warning; a reprimand (noted in the employee's personnel record); probation; demotion; temporary suspension; discharge; required reimbursement for losses or damages; and referral for criminal prosecution or civil action.
>
> Conduct which violates this Guide may also violate federal or state laws. Such violations may subject the employee to prosecution, imprisonment and fines. Hasbro may also be subjected to prosecution and fines for such conduct of its employees.
>
> Reporting possible violations of this code will not result in retaliation against you for making this report.

(Opposition at 14.) This quoted language, however, contains nothing which can be interpreted as requiring progressive discipline. Nor is there any ambiguity in the language which would require interpretation by a fact finder. *See Lohnes*, 272 F.3d at 53 (court has the responsibility of determining whether a contract is ambiguous).

Granted, Plaintiff argues that the quoted language required Hasbro to take five steps before discharging him (warning, reprimand, probation, demotion and temporary suspension) and two steps after (reimbursement and referral). In the court's view, however, the only reasonable interpretation of the Guide is that Hasbro had a choice, as it deemed appropriate, among eight potential disciplinary actions, i.e., that "violations . . . may result in one or more of the following, as appropriate. . . ." To read into this language an obligation on Hasbro's part to wend its way through lesser disciplinary actions before discharge not only fractures the language, but creates a burden which Hasbro would not likely impose on itself. Discharge is an alternative provided for by the Guide and the one deemed appropriate by Hasbro in Plaintiff's case. The court cannot say, as Plaintiff would have it, that Hasbro failed to follow this policy or improperly disciplined him as a result,

IV. CONCLUSION

For the foregoing reasons, the court ALLOWS Hasbro's motion for summary judgment on all three counts.

IT IS SO ORDERED.

DATED: October 27, 2003

/s/ Kenneth P. Neiman
KENNETH P. NEIMAN
U.S. Magistrate Judge

United States Court of Appeals
For the First Circuit

No. 03-2495

ROBERT P. JOYAL,

Plaintiff, Appellant,

v.

HASBRO, INC., d/b/a HASBRO GAMES,

Defendant, Appellee.

Before

Boudin, *Chief Judge*,
Lipez and Howard, *Circuit Judges*.

ORDER OF COURT
Entered: September 16, 2004

The petition for rehearing is denied. The petition's central claim is that it is enough under Masschusetts law to send the case to the jury where one of the reasons given by a company for discharge is inaccurate even though not knowingly false. No authority is cited for this position – and indeed, the Supreme Judicial Court has stated to the contrary. *See Knight v. Avon Prods., Inc.*, 780 N.E.2d 1255, 1261 n.4 (Mass. 2003). An inaccurate (albeit honest) reason would not normally be described as "pretextual." More important, the position makes little sense: the notion that a false answer can give rise to an inference of intentional discrimination is not irrational where the answer is knowingly false (on the principle *falsus in uno, falsus in omnibus*), but an innocent mistake suggests only happenstance

or carelessness rather than a guilty conscience. Amicus briefs are unnecessary and the request for an extension of time is also denied.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

[cc: Jessica A. Foster, Esq., Karen E. Schneck, Esq., Michael A. Haberman, Esq., Neil Jacobs, Esq., Tani E. Sapirstein, Esq.]

United States Court of Appeals
For the First Circuit

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ROBERT P. JOYAL,

Plaintiff, Appellant,

v.

HASBRO, INC., d/b/a HASBRO GAMES,

Defendant, Appellee.

Before

Boudin, *Chief Judge*,
Torruella and Selya, *Circuit Judges*,
Lynch*, Lipez and Howard, *Circuit Judges*.

ORDER OF COURT
Entered: September 16, 2004

The suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for the suggestion for rehearing en banc, be *denied*.

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* Judge Lynch is recused and did not participate in the consideration of this matter.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

[cc: Jessica A. Foster, Esq., Karen E. Schneck, Esq., Michael A. Haberman, Esq., Neil Jacobs, Esq., Tani E. Sapirstein, Esq.]

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28 U.S.C. Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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28 U.S.C. Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

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28 U.S.C. Sec. 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residents shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

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28 U.S.C. Sec. 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

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28 U.S.C. Sec. 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the

United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give

written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

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28 U.S.C. Sec. 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

GENERAL LAWS OF MASSACHUSETTS

PART I.
ADMINISTRATION OF THE GOVERNMENT

TITLE XXI.
LABOR AND INDUSTRIES

CHAPTER 151B. UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Chapter 151B: Section 4 Unlawful practices

Section 4. It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

* * *

1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1C. For the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law.

* * *

751 N.E.2d 360, 434 Mass. 493 (2001)

Supreme Judicial Court of Massachusetts,

Middlesex.

Martha C. LIPCHITZ

v.

RAYTHEON COMPANY.[1]

Argued Feb. 8, 2001.

Decided July 9, 2001.

[**363*494] Joan A. Lukey, Princeton, NJ (Mary B. Strother with her) for the defendant.

Jody L. Newman, Boston (Phyllis A. Flora with her) for the plaintiff.

Marisa A. Campagna, Betsy Ehrenberg, Boston, & James S. Weliky, Jamaica Plain, for National Employment Lawyers Association, Massachusetts Chapter & others, amicus curiae, submitted a brief.

Present MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, and CORDY, JJ.

SPINA, J.

Martha C. Lipchitz brought this civil action in 1995 against her employer, Raytheon Company, alleging that she was denied a promotion to the position of corporate medical director (CMD) because of her gender in violation

[1] We acknowledge receipt of the joint amicus brief filed by the Massachusetts chapter of the National Employment Lawyers Association, the Disability Law Center, Gay & Lesbian Advocates and Defenders, and the Women's Bar Association of Massachusetts.

of G.L. c. 151B, § 4.[2] The jury returned a verdict for the plaintiff and awarded her $500,000 in compensatory damages, including $30,000 in back pay, $150,000 in front pay, and $320,000 for emotional distress. Raytheon filed several posttrial motions, all of which were denied, except for Raytheon's motion for remittitur.[3] The plaintiff moved for attorney's fees and costs and received an award of $225,000 and $20,681, respectively.

Raytheon appealed, and we granted its application for direct appellate review. Raytheon claims that the jury were improperly instructed that the plaintiff was only required to prove "pretext" rather than "pretext for discrimination," and that it was entitled to an instruction that gender was "the determinative factor" in the promotion decision. We do not adopt Raytheon's [**364] argument as to how a jury should be instructed on the question of pretext. We conclude, however, that Raytheon was entitled to an instruction [*495] that the plaintiff had the burden of proving the elements of discriminatory animus, and that discrimination was "the determinative cause" of the adverse employment decision as we later define that term. We vacate the judgment and remand the case to the Superior Court for a new trial.

We further recommend that in discrimination cases based on indirect evidence, judges abandon the use of jury instructions that rely on the terms "pretext" and "pretext

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[2] Lipchitz's discrimination claim encompassed both the allegation that she was passed over for promotion in favor of a male colleague, and that she was perceived negatively because she was a woman.

[3] The judge reduced the award for front pay to $70,000 and reduced the award for emotional distress to $225,000.

for discrimination," and that are framed in terms of shifting burdens.

1. Background Facts.

In 1975, Lipchitz began working as a physician in the medical department of Raytheon's largest manufacturing plant located in Andover. The department was responsible for performing physical examinations and providing on-site general and emergency medical services for the plant's 5,000 to 7,000 employees. In 1980, Lipchitz was promoted to manager of the Andover plant's medical services department, in which capacity she supervised the plant's medical department and staff. In addition to her regular administrative duties (including, for example, coordinating and monitoring the medical care of individuals receiving workers' compensation, attending meetings, and writing reports), she also took the initiative to study health and safety issues affecting Raytheon's employees, such as substance abuse, and developed teaching modules for plant supervisors on those subjects. At the time of trial in 1997, Lipchitz continued to be employed by Raytheon in this position.

From 1980 until 1993, Lipchitz reported directly to Andover plant managers, and had a "dotted-line" supervisory relationship with the CMD, Stephen Alphas.[4] Throughout those years, Lipchitz received highly favorable written performance reviews, the vehicle by which recommendations for merit increases generally were made.

[4] In 1993, a reorganization of the medical department brought Lipchitz and the other full-time plant physicians directly under the supervision of the CMD.

Lipchitz's favorable evaluations resulted in a salary that was at the upper end of the salary grade for her [*496] position, as well as frequent bonuses and, eventually, stock options.[5]

In addition to the performance evaluations, Lipchitz wrote annual or biennial self-evaluations in which she catalogued her contributions and accomplishments, and noted her strong desire to advance into a corporate position. The only corporate position available to a practicing medical doctor was the CMD position, and as the years went by Lipchitz made known her desire to fill that position when Alphas retired. Her performance evaluations noted both her desire for advancement and her capacity for a management position.

In 1988, after he underwent bypass surgery, Alphas continued in the CMD position but his superiors raised with him the question of who would succeed him. In 1989, Alphas hired Harry Azadian as a full-time plant physician. Azadian was a long-time acquaintance and colleague of Alphas and had been working one day a [**365] week at Raytheon since 1977. Lipchitz presented evidence to suggest that both the decision to offer Azadian the full-time position and the manner in which he was hired reflected Alphas's expectation that Azadian would be his

[5] Job positions were assigned a salary grade from one to eighteen. Lipchitz was at grade fourteen, as was Harry Azadian both while he was a plant physician and after his promotion to acting CMD. Stephen Alphas began in 1977 at grade fourteen but reached grade seventeen some twelve years later. The CMD job description written in 1990 described the job as being grade seventeen. The range of salaries in each grade was so broad that there was considerable overlap between the salaries in grades fourteen and seventeen.

successor. There was additional evidence to suggest that this view was shared by Azadian.

A job description for the position was written in 1990 and required that the CMD be "[b]oard [c]ertif[ied] in an appropriate area of specialization." Azadian was board certified as a general surgeon; Lipchitz was not board certified. Alphas, the outgoing CMD had not been board certified.

Raytheon argued that its reason for passing over Lipchitz in favor of Azadian was primarily difficulties over the years between Lipchitz and Alphas, the CMD, as well as between her [*497] and various managers within the Andover plant.[6] Lipchitz had pushed hard for certain opportunities she deemed necessary for her professional advancement, but the response she received from Andover plant managers was negative and, on occasion, patronizing.[7] At the same time, she tended to rebuff requests from Alphas and other managers to take on additional responsibilities, requests that might have been viewed by them as ways to earn opportunities for advancement. Her superiors perceived her as unwilling to take on extra work without asking for additional compensation, and unwilling to be a "team player."[8] These perceptions

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[6] Alphas had, on at least one occasion, referred to Lipchitz as "big-breasted Martha" and a "bitch."

[7] Lipchitz testified that one manager asked, "Why can't you just stay where you are and polish your pearl and if you're lucky maybe some day somebody will notice."

[8] For example, Alphas testified that on one occasion, Lipchitz balked at a clear directive of his regarding a temporary deployment of her staff to help out at another plant. Lipchitz contended that the dotted-line supervisory relationship did not give Alphas the authority to give such an order. On another occasion, she refused to sign a medical

(Continued on following page)

were reflected in notations made on documents relevant to, and contemporaneous with, the promotion decision. Testimony regarding the difficulties with her superiors was corroborated by Lipchitz's desk diary in which she had recorded her disagreements with various managers and supervisors over the years. These difficulties were not mentioned in Lipchitz's annual reviews or in her self-evaluations.

Alphas retired in January, 1994, and Azadian was promoted shortly after. Rather than receive a full promotion to CMD and a salary increase to that position's salary grade, Azadian was appointed the acting CMD and his salary remained unchanged. The vice-president of human resources testified that Azadian was appointed to this provisional position because Alphas's retirement was the opportunity he had been awaiting to consider reorganizing the medical department or outsourcing medical services. It was possible that such a change would eliminate the CMD position. Testimony revealed, however, that as acting CMD, Azadian had all the authority of the CMD, and he [*498] expressed his belief that his title and salary had been on hold because of the litigation.[9]

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department petition he had initiated as CMD recommending that the plants be smoke-free working environments. At the time Lipchitz did not explain her refusal to sign, but at trial stated simply that she did not sign petitions.

[9] Lipchitz filed her administrative claim with the Massachusetts Commission Against Discrimination a few weeks after Azadian was promoted.

2. Sufficiency of the Evidence on Liability.

After the close of the plaintiff's evidence, Raytheon moved for a directed verdict. [**366] On appeal, it argues that there was insufficient evidence to support a finding of pretext at the third stage of the now-familiar order of proof originally set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and adopted by us in *Wheelock College v. Massachusetts Comm'n Against Discrimination,* 371 Mass. 130, 355 N.E.2d 309 (1976).

The plaintiff presented sufficient evidence from which a reasonable jury could find that at least one of Raytheon's reasons was false and from this it properly could have inferred that she was not promoted because of unlawful discrimination. See *Abramian v. President & Fellows of Harvard College,* 432 Mass. 107, 118, 731 N.E.2d 1075 (2000). The reasons Raytheon presented for its decision were Lipchitz's lack of board certification, and the personal and workstyle difficulties she had with members of management. However, where Lipchitz's performance evaluations included comments suggesting that she was qualified to hold a management position, the jury could have found that the question of board certification was not the reason Lipchitz had not been promoted, and in other circumstances, the lack of board certification might have been accommodated.[10] In addition, the jury could have

[10] In its closing, Raytheon argued to the jury that the question of qualifications went only to the matter of whether Lipchitz had satisfied her burden of proof in the first stage. Raytheon does not appeal from the jury's finding that the plaintiff satisfied that burden of proof, but folds the matter of qualifications into its argument that there was insufficient evidence to support a finding of liability. The issue of qualifications was sufficiently pervasive at trial to have led the judge to

(Continued on following page)

credited Lipchitz's contention that the difficulties she had with Alphas, the CMD, and her Andover managers were not the result of her personality and workstyle and therefore, were the result of gender bias. If the jury found Lipchitz to be a credible witness, and discredited the testimony of Raytheon's witnesses, the jury could reasonably have [*499] believed that, had she been a man, her strict adherence to her principles and the official lines of command, and her determination about advancing her career, might have been viewed with admiration rather than resentment.

"The ultimate issue of discrimination, raised by the [parties'] conflicting evidence as to the defendant['s] motive, is not for a court to decide on the basis of [briefs and transcripts], but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of the witnesses." *Blare v. Husky Injection Molding Sys. Boston, Inc.,* 419 Mass. 437, 445, 646 N.E.2d 111 (1995). See *Dartt v. Browning-Ferris Indus., Inc. (Mass.),* 427 Mass. 1, 16, 691 N.E.2d 526 (1998). Viewing the evidence in its light most favorable to the plaintiff, the evidence was sufficient to support a finding that at least one of the reasons advanced by Raytheon was false, from which the jury could have inferred that the plaintiff was denied a promotion because of her gender. See *Abramian v. President & Fellows of Harvard College, supra* at 118, 731 N.E.2d 1075. The motion for a directed verdict was properly denied.

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describe Raytheon's articulated reason as "legitimate factors involving qualifications."

We do not address Raytheon's argument that the verdict was against the weight of the evidence because we are remanding for a new trial due to errors in the jury instructions.

3. Jury Instructions.

(a) Pretext. Raytheon submitted a written request for an instruction that Lipchitz [**367] had the burden of proving that Raytheon's reasons for not promoting her were a "pretext for discrimination." It renewed the request after the judge charged the jury and before the jury retired to deliberate. See Mass. R. Civ. P. 51(b), 365 Mass. 816 (1974). The issue was preserved for appellate review. *Torre v. Harris-Seybold Co.,* 9 Mass.App.Ct. 660, 678-679, 404 N.E.2d 96 (1980).

Raytheon argues that the judge's failure to give its requested instruction ("pretext for discrimination") and to use instead the term "pretext," without more, lowered Lipchitz's burden in the third stage.[11] Raytheon additionally argues that the jury's inability to reach a consensus on question 4, one of the special [*500] questions that the judge asked the jury to answer, is evidence of this flaw in the

[11] The judge did incorporate some of Raytheon's requested language into his instructions. However, viewed as a whole, the import of the instructions was that the plaintiff had met her burden with proof of "pretext," and "pretext" alone, as the plaintiff seems to concede. The judge instructed the jury, "In this [the third] stage, the burden is on the plaintiff to prove by a fair preponderance of the evidence that the reasons given by the defendant were not the real reasons for failing to promote her . . . but were a pretext for gender discrimination. Under the laws of the Commonwealth, the plaintiff may satisfy the plaintiff's burden by proving that the employer's articulated reason or reasons was not the real reason or reasons for the hiring decision."

instructions.[12] Lipchitz counters that because Massachusetts is a "pretext only" jurisdiction, *Blare v. Husky Injection Molding Sys. Boston, Inc., supra* at 443, 646 N.E.2d 111, Raytheon was not entitled to an instruction that she prove

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[12] The four questions of the special jury verdict form that went to the issue of liability, Mass. R. Civ. P. 49(a), 365 Mass. 812 (1974), read as follows:

"1. Did the plaintiff prove by a preponderance of the evidence that:

"A. The Plaintiff was qualified for promotion to the position of Acting Corporate Medical Director? [Answer: Yes]

"If yes, go to B

"If no, go no further

"B. Another person with lesser or similar qualifications received appointment to the position of Acting Corporate Medical Director? [Answer: Yes]

"If yes, go to 2

"If no, go no further

"2. Did the Defendant produce credible evidence articulating a legitimate, non-discriminatory reason as its real reason for not appointing the Plaintiff to the position of Acting Corporate Medical Director? [Answer: Yes]

"If yes, go to 3

"If no, go to 4

"3. Did the Plaintiff prove gender discrimination by proving by a preponderance of the evidence that the reason given by the Defendant was a pretext in that it was not the real reason for not appointing the Plaintiff to the position of Acting Corporate Medical Director? [Answer: Yes]

"If yes, go to 4

"If no, go no further

"4. This is an advisory question which does not effect [*sic*] the ultimate verdict and is presented for administrative purposes only. Did the Plaintiff prove by a preponderance of the evidence that the Defendant's actual motivation when filling the position was gender discrimination? [Answer: handwritten on slip, 'Could not reach a 1 0/2 decision.']"

"pretext for discrimination" because it would have been an incorrect statement of the law.

The phrase "pretext for discrimination" implies that the plaintiff must prove not only that a reason given by the employer [*501] for the adverse decision was false, but that the reason was given to cover a discriminatory animus. Our decisions do not require this. See *Abramian v. President & Fellows of Harvard College, supra* at 118, 731 N.E.2d 1075. Cf. *Matthews v. Ocean Spray Cranberries, Inc.,* 426 Mass. 122, 128, 686 N.E.2d 1303 (1997). If the employee were able to prove by direct evidence that discriminatory animus motivated [**368] the decision, she would not have to rely on the indirect method of proving animus by disproving at least one of the employer's articulated, nondiscriminatory reasons. Compare *Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination,* 431 Mass. 655, 729 N.E.2d 1068 (2000), with *Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination,* 20 Mass.App.Ct. 172, 478 N.E.2d 1292 (1985).

In an indirect evidence case, if the fact finder is persuaded that one or more of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind. See *Riffelmacher v. Police Comm'rs of Springfield,* 27 Mass.App.Ct. 159, 165, 535 N.E.2d 1280 (1989). Permitting, but not requiring the fact finder to draw the inference strikes the proper balance by holding the plaintiff to her ultimate burden without requiring her to produce direct evidence of discriminatory animus, a form of evidence that, we recognize, rarely exists. See *Wheelock College v. Massachusetts Comm'n Against Discrimination,* 371 Mass. 130, 137, 355 N.E.2d 309 (1976). Cf. *Sarni Original Dry Cleaners, Inc. v. Cooke,* 388 Mass. 611, 615-616, 447 N.E.2d 1228 (1983).

That inference, combined with the evidence adduced to meet the employee's burden of proof under the first stage of *McDonnell Douglas,* permits the fact finder to conclude that the employee has satisfied her ultimate burden of proving that the decision was made "because of" the unlawful discrimination as G.L. c. 151B, § 4(1), requires.[13] See *Abramian v. President & Fellows of Harvard College, supra* at 118, 731 N.E.2d 1075.

(b) *Discriminatory animus.* Although a "pretext for discrimination" instruction was not required, we agree that the instructions [*502] on the issue of pretext, given without the benefit of any instructions on discriminatory animus, were, for the reasons that follow, erroneous. (The special verdict form the jury were asked to complete also reflected the error.)

The statute sets out four elements: membership in a protected class, harm, discriminatory animus, and causation. See note 13, *supra.* See also *Dahill v. Police Dep't of Boston,* 434 Mass. 233, 243, 748 N.E.2d 956 (2001) (membership in protected class and causation); *Abramian v. President & Fellows of Harvard College, supra* at 117, 731 N.E.2d 1075 (animus); *MacCormack v. Boston Edison Co.,* 423 Mass. 652, 662-663, 672 N.E.2d 1 (1996) (harm). It was undisputed that Lipchitz was a member of a protected class because she was a woman, and was harmed by an employment decision when Raytheon bypassed her for

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[13] General Laws c. 151B, § 4(1), provides that "It shall be an unlawful practice . . . [f]or an employer . . . because of the . . . sex . . . of any individual to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification."

promotion. We therefore turn our attention to the element of discriminatory animus.

As we have said, in an indirect evidence case, we permit the fact finder to infer discriminatory animus (and causation) from proof that the employer offered a false reason for the adverse employment decision. Permitting the fact finder to infer discriminatory animus from proof that the employer has advanced a false reason does not, however, eliminate the plaintiff's burden to prove this essential element. See *School Comm. of Boston v. Labor Relations Comm'n,* 40 Mass.App.Ct. 327, 334, 664 N.E.2d 455 (1996). Stated differently, the "indirect evidence" moniker [**369] derives from the type of evidence (pretext) that may establish one or both statutory elements (discriminatory animus and causation).[14] Cf. *Johansen v. NCR Comten, Inc.,* 30 Mass.App.Ct. 294, 299-300, 568 N.E.2d 611 (1991). Pretext does not thereby become the element.

Here, the entire import of the instruction on Lipchitz's burden [*503] to establish liability was whether she had proved "pretext," not whether she had proved that Raytheon had refused to promote her "because of . . . [her] sex." G.L. c. 151B, § 4(1). See *Lewis v. Area II Homecare*

[14] Proof that one or more of the employer's stated reasons is false may be accomplished by offering some direct evidence of discriminatory animus. See *Blare v. Husky Injection Molding Sys.Boston, Inc., supra* at 445, 646 N.E.2d 111. While this evidence may be insufficient to satisfy the evidentiary threshold for so-called "direct evidence" cases we recently set out in *Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination,* 431 Mass. 655, 669-670, 729 N.E.2d 1068 (2000), it may be sufficient to permit the fact finder to conclude that at least one of the employer's reasons is false, and therefore to support an inference that the adverse employment action was made because of discrimination. The ultimate issue of discrimination does not differ depending on the type of proof available to the plaintiff.

for Senior Citizens, Inc., 397 Mass. 761, 767, 493 N.E.2d 867 (1986). Cf. *Carter v. Comm'r of Correction*, 43 Mass.App.Ct. 212, 226, 681 N.E.2d 1255 (1997). The instruction transformed "pretext" into an essential element of the plaintiff's case. The error was compounded by the additional instruction that if Lipchitz established that the reasons given by Raytheon were not its "real reason," she had established Raytheon's liability and the jury were to move on to the question of assessing damages.[15] See *Abramian v. President & Fellows of Harvard College, supra* at 117-118, 731 N.E.2d 1075. The only "instruction" the jury received on discriminatory animus was given in connection with special question 4, an advisory question, which the judge described to the jury as having "no effect" on the verdict.[16]

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[15] This case was tried more than two years before our decision in *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 731 N.E.2d 1075 (2000), in which we clarified (1) that pretext alone was sufficient to support a finding of liability and that the plaintiff was not required, in addition, to furnish evidence of actual discrimination once the employer advanced its nondiscriminatory reasons, and (2) that a showing of pretext permitted, but did not compel, the inference that the adverse employment action was because of discrimination. *Id.* at 118, 731 N.E.2d 1075. We do not criticize the judge for having to deal with the uncertainty generated by our decision in *Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 646 N.E.2d 111 (1995), on these matters.

[16] The judge instructed: "I have asked the jury an advisory question, and please understand that the answer to this question in no way affects the outcome of this trial, [and is] for administrative purposes only. I am asking you to consider whether or not the plaintiff has proven by a preponderance of the evidence that the defendant had a discriminatory motive in making its hiring decision? Here the jury may consider indirect and circumstantial evidence in determining whether the plaintiff has proven that the hiring decision was motivated by gender discrimination. . . . Did the plaintiff prove by a preponderance of the evidence that the defendant's actual motivation when filling the

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[**370*504] The judge should have instructed that Lipchitz was required to prove that Raytheon acted with a discriminatory intent, motive or state mind. As we said in *Abramian v. President & Fellows of Harvard College, supra,* decided two years after the trial in this case, juries should be instructed that this element of proof may be satisfied by circumstantial evidence, such as the inference of discriminatory animus that may be drawn from proof that one or more of the reasons advanced by the employer is false.

(b) Causation. Raytheon also requested an instruction that Lipchitz had to persuade the jury that her gender was "the determining factor in the decision not to promote

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position, was gender discrimination?" Jurors were unable to agree on an answer to special question 4, which illustrates the problem at hand. See note 12, *supra.*

In response to a question from the jury with respect to this question, the judge further instructed the jury that an actual motive to discriminate required a "conscious motive toward gender bias." Although special question 4 was advisory, this instruction was error. Despite heightened awareness about workplace diversity and discrimination, an employer will not necessarily be aware of his or her bias. Stereotypical thinking, for example, involves categorizing people on the basis of broad generalizations, not necessarily accompanied by deliberate reflection or conscious thought. Employment decisions that are made *because of* stereotypical thinking about a protected characteristic or members of a protected class, whether conscious or unconscious, are actionable under G.L. c. 151B. See *Thomas v. Eastman Kodak Co.,* 183 F.3d 38, 42 (1st Cir.1999), cert. denied, 528 U.S. 1161, 120 S.Ct. 1174, 145 L.Ed.2d 1082 (2000) ("Title VII's prohibition against 'disparate treatment because of race' extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias"). See also *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (unlawful employment practice under Federal age discrimination law to make decisions on "basis of inaccurate and stigmatizing stereotypes").

her to Acting CMD," and that "but for" a motive to discriminate . . . she would have been promoted." (emphasis added) Raytheon argues that without this instruction, the jury were ill-equipped to weigh the factors involved in the promotion decision if they were persuaded that some of its reasons were legitimate and some were discriminatory. Lipchitz contends that Raytheon was not entitled to this instruction because it is only applicable in cases in which plaintiffs presents strong, direct evidence of discrimination and further, that if the instruction was necessary, that Raytheon should bear the burden of proof. See *Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, supra* at 670, 729 N.E.2d 1068. This issue was preserved for review. See *Flood v. Southland Corp.*, 416 Mass. 62, 66, 616 N.E.2d 1068 (1993). We agree with Raytheon that in indirect evidence cases the plaintiff must prove that the defendant's discriminatory animus was the determinative cause, which we describe below, in bringing about the adverse decision.

[*505] Under the plain language of G.L. c. 151B, § 4, liability attaches when an adverse employment decision is made "because of" discrimination.[17] We have never had occasion to decide whether jurors must be instructed on the statute's causal link. Such a requirement is, however, implicit in our decisions. See, e.g., *Dahill v. Police Dep't of*

[17] "Because of" under c. 151B triggers liability at the same level of causation for all claims of employment discrimination, whether the evidence presented by the plaintiff is "indirect" (in so-called "pretext" cases) or "direct" (in so-called "mixed motive" cases). Cf. *Wallace v. Ludwig,* 292 Mass. 251, 254-255, 198 N.E. 159 (1935). With respect to the element of causation, the distinction between "direct" and "indirect" evidence cases is not the degree of causation, but who bears the burden of proving it.

Boston, supra (plaintiff must prove causation); *Melnychenko v. 84 Lumber Co.,* 424 Mass. 285, 294, 676 N.E.2d 45 (1997) (ruling for defendant was proper where judge found that retaliation was not "a determinative factor" in discharge); *MacCormack v. Boston Edison Co., supra* at 662 n. 11, 672 N.E.2d 1 (evidence would not have been sufficient to meet "but for" burden of causation); *Brunner v. Stone & Webster Eng'g Corp.,* 413 Mass. 698, 705, 603 N.E.2d 206 (1992) [**371] ("but for" causation is "essential element of [plaintiff's] case"); *DiBenedetto v. Commonwealth,* 398 Mass. 395, 400, 497 N.E.2d 266 (1986), cert. denied, 479 U.S. 1092, 107 S.Ct. 1305, 94 L.Ed.2d 160 (1987) (discrimination was "not a causative factor" in hiring decision); *Trustees of Forbes Library v. Labor Relations Comm'n,* 384 Mass. 559, 562-563, 428 N.E.2d 124 (1981) (retaliation must have been "but for cause");[18]; *Smith College v. Massachusetts Comm'n Against Discrimination,* 376 Mass. 221, 226-227, 380 N.E.2d 121 (1978) (sex must have been "a determinative cause"). See also *Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination, supra* at 179, 478 N.E.2d 1292. Cf. *Drinkwater v. School Comm. of Boston,* 406 Mass. 756, 762, 550 N.E.2d 385 (1990) (upholding race-conscious

[18] In *Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, supra,* we held that, where a plaintiff presents strong, direct proof that an unlawful consideration was a factor in the employment decision, the defendant, to escape liability, must prove that it would have made the same decision without the unlawful consideration. *Id.* at 669-670, 729 N.E.2d 1068. We recognized that this holding overruled that portion of *Trustees of Forbes Library v. Labor Relations Comm'n,* 384 Mass. 559, 565-566, 428 N.E.2d 124 (1981), that held that the burden of proof in a "direct evidence" case remained with the plaintiff. Our *Wynn & Wynn* decision did not, however, reject our earlier analysis regarding the degree of causation mandated by the statutory phrase "because of."

hiring plan against charge of reverse discrimination in part [*506] because "race was only *a factor*" officials were to consider [emphasis added]). In addition, we have approved jury instructions that have included language describing this causal link. See *Dartt v. Browning-Ferris Indus., Inc. (Mass.), supra* at 12 n. 18, 691 N.E.2d 526 ("plaintiff has the burden to prove . . . that but for plaintiff's handicap, the defendant would not have terminated the plaintiff"); *DiBenedetto v. Commonwealth, supra* at 401, 497 N.E.2d 266 (jury instructed that they must be convinced that "but for" discrimination, plaintiff would have been hired).[19]

The failure to alert the jury to the requirement that Lipchitz prove a causal link between Raytheon's alleged discriminatory animus and its decision to not promote her, was error.[20] It was prejudicial because [**372] here, the

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[19] Our decisions have described the causal element in various ways, which essentially have been the proximate or determinative cause standard used in negligence cases. A cause is the determinative cause if it was the active efficient cause in bringing about the adverse employment action. See *Jussim v. Massachusetts Bay Ins. Co.*, 415 Mass. 24, 27, 610 N.E.2d 954 (1993), citing *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 575, 33 N.E. 690 (1893) (proximate cause). In other words, the plaintiff must prove by a preponderance of the credible evidence that the defendant's discriminatory animus contributed significantly to that action, that it was a material and important ingredient in causing it to happen. Cf. *Nass v. Duxbury,* 327 Mass. 396, 400, 99 N.E.2d 54 (1951). That a defendant's discriminatory intent, motive or state of mind is "the determinative cause" does not imply the discriminatory animus was the only cause of that action. See *Dartt v. Browning-Ferris Indus., Inc. (Mass.), supra* at 7-9, 691 N.E.2d 526 ("because of" does not mean "solely because of"). See also D.B. Dobbs, Torts § 168, at 410 (2001) ("Nothing is the result of a single cause in fact. The but-for test does not say otherwise").

[20] The statutory language is quite clear, and might have sufficed had it been included verbatim in the charge. The judge's paraphrase of

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evidence suggested several reasons for Raytheon's decision to pass over Lipchitz, some of which the jury could have found to be credible, some of which the jury might have found to be not credible.

We note, however, that to meet her burden of proof that discrimination was the determinative cause of the promotion decision, Lipchitz was not required to disprove every reason articulated by the defendant or suggested in the evidence. See [*507] *Dartt v. Browning-Ferris Indus., Inc. (Mass.), supra* at 9, 691 N.E.2d 526. She could meet her burden by persuading the fact finder that it was more likely than not that at least one reason was false. But see *Wheelock College v. Massachusetts Comm'n Against Discrimination, supra* at 137, 355 N.E.2d 309 (remanding for rehearing because commissioner had only addressed three of the four reasons offered by defendant). From such proof the fact finder could infer that Raytheon's discriminatory animus was the determinative cause of the adverse employment decision.

The plaintiff is correct that reversible error will not be found merely by "consideration of [a] fragment [of an instruction] which may be open to criticism." See *Haven v. Brimfield,* 345 Mass. 529, 533, 188 N.E.2d 574 (1963). Reversible error may lie, however, where the error of a "fragment" reflects the error of the instructions read as a whole. We are presented here with a jury charge that

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the statute at the start of the charge that "[a]ccording to the laws of the Commonwealth, and in particular, Chapter 151B, it is an unlawful practice to discriminate on the basis of gender" was not adequate, particularly where the only other reference to a causal connection was the somewhat oblique statement that "[t]he plaintiff claims that she was qualified for the position but bypassed because she was a woman."

failed to instruct the jury adequately on two necessary elements under the statute. The error was compounded by the judge's incorrect instruction that, if Lipchitz proved that Raytheon had lied, she had prevailed in the litigation. See *Abramian v. President & Fellows of Harvard College, supra* at 117-118, 731 N.E.2d 1075. Considered as a whole, *Lockwood v. Boston Elevated Ry.*, 200 Mass. 537, 544, 86 N.E. 934 (1909), the charge failed to "clearly, adequately, and correctly explain[] to the jury the principles that ought to guide and control their action." *Torre v. Harris-Seybold Co.*, 9 Mass.App.Ct. 660, 678-679, 404 N.E.2d 96 (1980), and cases cited. The failure to instruct on these elements was prejudicial and the case must be retried. See *Tuttle v. McGeeney,* 344 Mass. 200, 207-208, 181 N.E.2d 655 (1962).

4. Issues on Remand.

We take this opportunity to discuss issues that are likely to arise at retrial.[21]

(a) Jury instructions. Jury instructions drawn directly from the order of proof originally described in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), have been problematic. Decided in the context of the Federal antidiscrimination law, *McDonnell Douglas* represented an enormous step forward in employment discrimination law by providing plaintiffs who [*508] lacked "smoking gun" evidence a method to present – and prove – their cases, and we have used its order of proof in analyzing cases brought under our own anti-discrimination statute since 1976. See

[21] Because of our order for a new trial, we do not reach Raytheon's challenge to the damages award.

Wheelock College v. Massachusetts Comm'n Against Discrimination, 371 Mass. 130, 138, 355 N.E.2d 309 (1976). However, this "analytical framework" was established in the context of summary judgment "to give judges a method of organizing evidence and assigning the burdens of production and persuasion in a discrimination case." *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1016 (1st Cir.1979). It [**373] "was not written as a prospective jury charge," *id.,* and is ill-suited to the task: By the time of trial, a plaintiff will have discovered the employer's reasons for the adverse action, and may present them in his or her case-in-chief, together with evidence that one or more of the reasons is false.

We see no reason to burden the jury with terms like "mixed-motive" and "pretext" or with rules regarding shifting burdens, all of which "have taken on lives of their own, independent of their connection to the underlying theories of liability that gave them birth." See *Miller v. CIGNA Corp.,* 47 F.3d 586, 599 (3d Cir.1995) (Greenberg, J., concurring in part). See also Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 11.5.1 (1997 ed.); Model Civil Jury Instructions for the District Courts of the Eighth Circuit § 5.01 (1999 ed.). The burden shifting rules involve questions of law more appropriately left to the trial judge to decide. See, e.g., *Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 52-53 (2d Cir.1998). We encourage trial judges to craft instructions that will focus the jury's attention on the ultimate issues of harm, discriminatory animus and causation in accordance with this opinion.

(b) Admissibility of "statistical" evidence in claims of individual disparate treatment. Raytheon argues that the plaintiff's evidence regarding the gender composition at

its highest ranks was statistical evidence that was both inadmissible and irrelevant. It argues that the evidence lacked the necessary foundation of labor market statistics reflecting the gender composition of those seeking such positions, and that it was irrelevant because the evidence related to non-medical positions.

The evidence indicated that until 1993, there were no women [*509] in the corporate ranks of the company. Such numbers are relevant, and may be properly introduced in a disparate treatment case, see *Lewis v. Area II Homecare for Senior Citizens, Inc.,* 397 Mass. 761, 769-770, 493 N.E.2d 867 (1986), because to the extent they suggest that the highest ranks of an employer's organization are closed to members of a protected class, they may support an inference that the particular decision was tainted by an unlawful bias. See *Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination,* 20 Mass.App.Ct. 172, 179, 478 N.E.2d 1292 (1985) (aberrant hiring practice "supplemented by the statistical proof" supported conclusion that explanation for failing to hire plaintiff "was only a pretext for unlawful discrimination"). A defendant is free to rebut the evidence, as Raytheon did here, by introducing its own labor market statistics.

The judgment is reversed, the verdict set aside, and the case is remanded to the Superior Court for a new trial.

So ordered.